Supreme Court, U.S.
FILED

98 775 NOV 10 1998

OFFICE OF THE CLERK

No. 98-___

In The

# Supreme Court of the United States

October Term, 1998

GORDON MILLER,

*Petitioner,*

v.

FRED VANNATTA, GEORGE BOEHNKE, AND CENTER TO PROTECT FREE SPEECH, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

DONALD CRAIG MITCHELL
1335 F Street
Anchorage, Alaska 99501
(907) 276-1681

*Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9188

## QUESTIONS PRESENTED

In 1994 the people of Oregon voted to add § 22 to art. II of the Oregon Constitution. Section 22 prohibits a candidate for State elective office from using or directing campaign contributions other than contributions that have been contributed to the candidate by residents of the candidate's election district. The Ninth Circuit held that § 22 violates the Fourteenth Amendment to the United States Constitution because the restriction that § 22 imposes on the exercise of free speech by campaign contributors who are not residents of a candidate's election district is not closely drawn to advance the State of Oregon's interest in preventing corruption of its electoral process. The questions presented are:

1. Whether the Ninth Circuit correctly held that a State's interest in protecting the republican form of its government is not a State interest whose advancement empowers a State to impose restrictions on the making of campaign contributions.

2. Whether the Ninth Circuit correctly held that the only corruption of its electoral process that empowers a State to impose restrictions on the making of campaign contributions is corruption that flows from contributions that are explicitly made in exchange for demonstrated political favors.

## PARTIES TO THE PROCEEDINGS

Petitioner, intervenor-defendant-appellant below, is a voter in Oregon elections, a former candidate for elective office in Oregon, and the sponsor of the ballot measure whose passage by the people of Oregon added § 22 to art. II of the Oregon Constitution.

Respondents, plaintiffs-appellees below, filed the action that resulted in the decision of the Court of Appeals that this petition requests the Court to review.

Phil Keisling, the Secretary of the State of Oregon, and Hardy Myers, the Attorney General of the State of Oregon (who subsequent to the commencement of this action replaced Ted Kulongoski in that office), were defendants-appellants below.

TABLE OF CONTENTS

Page

Table of Authorities ..... iv

Opinions Below ..... 1

Jurisdiction ..... 1

Constitutional Provision Involved ..... 1

Statement ..... 3

Reasons for Granting the Writ ..... 15

I. The Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court ..... 15

II. The Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court ..... 25

Conclusion ..... 29

Appendix A:
Opinion of the Court of Appeals for the Ninth Circuit, filed August 11, 1998.....App. 1

Appendix B:
Opinion and Order of the District Court for the District of Oregon, filed July 13, 1995.....App. 26

Appendix C:
Declaratory Judgment and Mandatory Injunction of the District Court for the District of Oregon, filed July 31, 1995 .....App. 47

Appendix D:
Order of the Court of Appeals for the Ninth Circuit denying Petition for Rehearing and Rejecting Suggestion for a Rehearing En Banc, filed September 18, 1998.....App. 49

Appendix E:
Affidavit of Gordon Miller in Support of Motion to Intervene, dated August 11, 1995 .....App. 51

## TABLE OF AUTHORITIES

Page

CASES:

*Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997) ..... 12

*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ..... 8, 13, 14, 24, 26, 28

*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... *passim*

*Burroughs and Cannon v. United States*, 290 U.S. 534 (1934) ..... 7

*California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) .... 15

*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ..... 28

*Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996) ..... 15

*Dunn v. Blumstein*, 405 U.S. 330 (1972) ..... 21

*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) .... 23

*Ex Parte Yarbrough*, 110 U.S. 651 (1884) ..... 19

*FEC v. Akins*, 118 S.Ct. 1777 (1998) ..... 13

*FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) ...24, 28

*FEC v. Nat. Right to Work Comm.*, 459 U.S. 197 (1982) ..... 26

*FEC v. NCPAC*, 470 U.S. 480 (1985) ..... 15, 26, 27

*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) ..... 3, 8, 13

*Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) ..... 14, 22

*Marston v. Lewis*, 410 U.S. 679 (1973) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*Martinez v. Bynum*, 461 U.S. 321 (1983) ..... 14

*Reynolds v. Sims*, 377 U.S. 533 (1964) ..... 3

*Shaw v. Reno*, 113 S.Ct. 2816 (1993) ..... 14

*South v. Peters*, 339 U.S. 276 (1950) ..... 3

*VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998) ..... 1

*United States v. Auto. Workers*, 352 U.S. 567 (1957) ..... 4

*Wesberry v. Sanders*, 376 U.S. 1 (1964) ..... 3

*Yniguez v. State of Arizona*, 939 F.2d 727 (9th Cir. 1991) ..... 11

CONSTITUTIONS:

U.S. CONST.:
Art. IV, § 4 ..... 10, 16

Amend. I ..... 7, 8, 11, 23, 28

Amend. XIV ..... 8, 11, 23

OR. CONST.
Art. II, § 22 ..... *passim*

FEDERAL STATUTES:

5 Stat. 491 (1842) ..... 19

34 Stat. 864 (1907) ..... 5

36 Stat. 822 (1910) ..... 5

37 Stat. 25 (1911) ..... 5

TABLE OF AUTHORITIES – Continued

Page

43 Stat. 1070 (1925) ..... 5

54 Stat. 767 (1940) ..... 6

57 Stat. 167 (1943) ..... 6

2 U.S.C. § 441b ..... 26

2 U.S.C. § 441c ..... 26

2 U.S.C. § 441e ..... 23, 26

5 U.S.C. § 7323(b)(1) ..... 26

18 U.S.C. § 603 ..... 26

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1331 ..... 11

42 U.S.C. § 1983 ..... 11

42 U.S.C. § 1988 ..... 11

Pub. L. No. 92-225, 86 Stat. 3 (1972) ..... 6

Pub. L. No. 93-443, 88 Stat. 1263 (1974) ..... 7

STATE STATUTES:

Calif. Stat., 1893, p. 15 ..... 5

Missouri Stat., 1893, p. 157 ..... 5

LEGISLATIVE MATERIALS:

H. R. 2183, 105th Cong. (1998) ..... 23

S. REP. NO. 92-96 (1971) ..... 6

S. REP. NO. 93-310 (1973) ..... 6

TABLE OF AUTHORITIES – Continued

Page

*Proposed Amendments to the Federal Election Campaign Act of 1971: Hearings Before the Senate Comm. on Rules and Administration*, 99th Cong. (1985) ..... 21

47 CONG. REC. 3002, 3010 (1911) ..... 5

144 CONG. REC. H4795 (daily ed. June 18, 1998) ..... 23

144 CONG. REC. H7330 (daily ed. August 6, 1998) ..... 23

OTHER MATERIALS:

Editorial, *Campaign Reforms Can Lift Confidence in Government*, STATESMAN JOURNAL, Oct. 10, 1994 ..... 10

THE FEDERALIST (Modern Library ed.) ..... 17, 18

RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790 (1982) ..... 4

ROBERT A. RUTLAND, ed.-in-chief, THE PAPERS OF JAMES MADISON (1975) ..... 18

Simeon E. Baldwin, *State Assumption of Nomination and Election Expenses*, 23 YALE L. J. 158 (1913) ..... 5

WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1983) ..... 27

## PETITION FOR A WRIT OF CERTIORARI

Gordon Miller petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 151 F.3d 1215 and reprinted in the appendix (App.) at App. 1. The opinion and order of the District Court for the District of Oregon is unreported and reprinted at App. 26-46.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 11, 1998. A petition for rehearing with suggestion for rehearing *en banc* was denied on September 18, 1998. App. 49-50. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Article II, § 22, of the Oregon Constitution provides:

> SECTION 1. For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the

public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.

SECTION 2. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of § (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of § (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

SECTION 3. A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of § (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of § (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.

SECTION 4. A violation of § (3) shall be an unclassified felony.

## STATEMENT

This case presents two questions of extraordinary importance regarding the authority of States and Congress to regulate the financing of election campaigns.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). For that reason, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). However, as Mr. Justice Douglas noted in *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting), "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth."

Simply put, if the election in which a ballot is cast is conducted pursuant to a procedure that is unfairly rigged, a citizen's participation by voting in the selection of the individuals who make the laws under which he or she must live is debased. If debasement repeatedly occurs, over time, the compact between citizens and the government that regulates their economic activities and enacts criminal and civil standards of personal conduct will be broken. For that reason, State governments have a compelling interest in "[p]reserving the integrity of the electoral process" and "the individual citizen's confidence in government." (citations omitted). *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978).

For more than a century the manner in which election campaigns are financed has threatened the integrity

of the electoral process and undermined the individual citizen's confidence in government.

In 1787 when the delegates who attended the Constitutional Convention wrote the U.S. Constitution, candidates for seats in State legislatures had no campaign expenses other than "treating," as the tradition of providing voters spirituous liquor at the polling place on election day was known. *See* RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 110-13 (1982). However, by 1887 the industrial revolution and the corporate form of economic organization operating in a laissez-faire regulatory environment had transformed the national economy. Economic progress also engendered dramatic improvements in transportation and mass communication technologies. As a result, campaigns for election to State office now cost money that managers of insurance companies, railroads, and other large corporations began contributing for the express purpose of influencing election outcomes to benefit candidates who would cast their votes as legislators to advantage the contributors' economic and policy interests.

By 1894 corporate campaign contributions had so corrupted outcomes of elections for seats in the New York Legislature that Eliuh Root, the chairman of the judiciary committee of the Constitutional Convention of the State of New York, publicly condemned the use of corporate funds by "the great aggregations of wealth . . . to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public." *Quoted in United States v. Auto. Workers*, 352 U.S. 567, 571 (1957).

Across the nation, State legislatures responded to the new threat that campaign contributions posed to the integrity of their electoral processes by enacting corrupt practices statutes. In 1893 the California Legislature enacted the Purity of Elections Act, Calif. Stat. 1893, p. 15, which required candidates to report campaign contributions and expenditures. The same year the Missouri Legislature enacted the Missouri Corrupt Practices Act, Missouri Stat. 1893, p. 157, which imposed a maximum dollar limitation on campaign expenditures made by candidates for election to the U.S. House of Representatives and state and municipal elective office. The Ohio and Oklahoma Legislatures enacted statutes similar to Missouri's, *see* 47 CONG. REC. 3002, 3010 (1911), as did other State legislatures. Simeon E. Baldwin, *State Assumption of Nomination and Election Expenses*, 23 YALE L. J. 158, 163 (1913).

The same corporations and wealthy individuals who made campaign contributions to influence the outcome of State elections also were making contributions to candidates for federal elective office. Congress responded to the threat in 1907 by prohibiting corporations from making contributions, 34 Stat. 864 (1907), in 1910 by requiring political committees to report contributions and expenditures, 36 Stat. 822 (1910), and in 1911 by prohibiting candidates from making campaign expenditures in excess of the amount a candidate could spend "under the laws of the State in which he resides," and in no case in excess of $5,000 for House candidates and $10,000 for Senate candidates, 37 Stat. 25 (1911). In 1925 Congress recodified those statutes in the Federal Corrupt Practices Act. 43 Stat. 1070 (1925). In 1940 Congress prohibited individuals and groups from contributing more than $5,000 a year to

any "candidate for an elective Federal office." 54 Stat. 767 (1940). And in 1943 Congress prohibited labor unions from making campaign contributions. 57 Stat. 167 (1943).

By 1960 television had revolutionized campaigning. In 1971 the Senate Committee on Commerce concluded that "the rapidly escalating cost of campaigning" that the need to broadcast television advertisements had engendered posed "a real and imminent threat to the integrity of the electoral process." S. REP. NO. 92-96, at 31 (1971). Congress responded by enacting the Federal Election Campaign Act (FECA). PUB. L. NO. 92-225, 86 Stat. 3 (1972). As the Senate Committee on Rules and Administration subsequently explained, the "fundamental purpose" of FECA

> was the public disclosure of political contributions and expenditures by all candidates seeking nomination or election to Federal office and by all other committees, groups or individuals seeking to influence the results of those elections, directly or indirectly. Existing limitations on contributions and expenditures were abolished with the intent to allow the citizens of the United States to act as judges of the amount and propriety of campaign receipts and expenditures by showing their approval or disapproval at the polls.

S. REP. NO. 93-310, at 1 (1973).

FECA also established a limit on the amount of money a candidate could spend on communications media.

In reaction to the documented abuse of FECA during the 1972 elections by contributors who had contributed

"huge sums of money to favored candidates" and political committees that had "resort[ed] to unusual methods to avoid compliance with the disclosure provisions of the new Act" – *see id.*, in 1974 Congress amended FECA. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

The 1974 FECA amendments limited individual contributions to $1,000 per candidate per election, limited contributions made by political committees (other than principal campaign committees) to $5,000 per candidate per election, and limited independent expenditures "relative to a clearly identified candidate" to $1,000 per candidate per year. The amendments also required candidates to comply with limitations on all campaign expenditures.

The U.S. Constitution grants Congress the "power of self protection" to safeguard federal elections "from the improper use of money to influence the result." *Burroughs and Cannon v. United States*, 290 U.S. 534, 545 (1934). But the First Amendment prohibits Congress from enacting statutes that abridge "the freedom of speech" or "the right of the people peaceably to assemble."

In *Buckley v. Valeo*, 424 U.S. 1 (1976), an action that challenged the constitutionality of the campaign contribution and expenditure limitations in the 1974 FECA amendments, the Court announced the standards for determining when a federal statute that imposes such limitations impermissibly interferes "with First Amendment freedoms." *Id.* 14.

The Court concluded that Congress may limit the making of campaign contributions, so long as the limitation advances an "important [governmental] interest" and does so through a "means closely drawn to avoid

unnecessary abridgment of associational freedoms." (citations omitted). *Id.* 24-25. With respect to limitations on the making by noncandidates of independent expenditures and on the making by candidates of campaign expenditures, the Court concluded that Congress may not limit expenditures unless the governmental interest that will be advanced "satisf[ies] the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* 44-45. After concluding that Congress intended contributor and candidate compliance with the contribution and expenditure limitations in the 1974 FECA amendments to serve the "primary governmental interest" of "prevention of actual and apparent corruption of the political process," *id.* 53, the Court upheld the challenged contribution limitations, but invalidated the expenditure limitations.

Because the Fourteenth Amendment prohibits States from infringing upon rights to free speech and political association protected by the First Amendment, this Court and the inferior federal courts apply the *Buckley* standards when they review challenges to State campaign finance statutes, *e.g.*, *First National Bank of Boston v. Bellotti, supra* at 788-89; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). In 1995 the District Court for the District of Oregon applied *Buckley* to invalidate the provision of the Oregon Constitution that is the subject of this petition. App. 41-45.

Because prior to the 1994 election the State of Oregon imposed no restrictions on the making of campaign contributions, political action committees (PACs), corporations, labor unions and other contributors whose financial and policy interests are regulated by the Oregon

Legislature routinely contributed as many dollars as they wished to candidates who routinely spent every dollar. As a consequence, between 1972 and 1992 the average cost of an election campaign for a seat in the Oregon House of Representatives escalated from $3,100 to $38,000, and the average cost of an election campaign for a seat in the Oregon Senate escalated from $5,500 to $49,000. Gordon Miller Excerpts of Record (GMER), at 84-85. During the 1992 election candidates for election to the Oregon House of Representatives obtained 69 percent of their contributions from PACs and 12 percent from corporations, a total of 81 percent. Candidates for election to the Oregon Senate obtained 60 percent of their contributions from PACs and 15 percent from corporations, a total of 75 percent. *Id.* 75. And prior to the 1994 election Mark Hemstreet, an Oregon businessman who to protect his business interests wanted the Oregon Legislature to enact tort reform, contributed $166,650 to forty-three candidates for the Oregon House of Representatives and Senate. *Id.* 112-14.

To what extent did making those contributions allow contributors to unduly influence the outcome of elections for seats in the Oregon Legislature and the subsequent legislative actions of successful candidates? As the *Statesman Journal*, the newspaper of record in Salem, the state capitol, aptly summed the situation:

> Is it any wonder that the public is cynical about government and public service when they learn whose money put their public servants into office? Even the most dedicated and conscientious politicians will have trouble showing their independence on critical legislative and policy

> issues when they know who their financial sugar-daddies are. And even the most open-minded citizens will have trouble maintaining confidence in a system dominated by bales of money from a few high-powered special interests.

Editorial, *Campaign Reforms Can Lift Confidence in Government*, Statesman Journal, Oct. 10, 1994, *reprinted at* GMER 51-52.

One member of the Oregon public who is not cynical about government and public service is petitioner Gordon Miller. After concluding that the Oregon campaign finance system "violate[d] elemental principles of the 'republican form of government' that the Founding Fathers guaranteed to the people of Oregon by including article IV, § 4, in the United States Constitution," and that the "Oregon Legislature [was] not likely to change the campaign finance rules that its members have used successfully to win election to office," petitioner Miller wrote Measure No. 6. He then organized "Freedom from Special Interests," a citizens' group that obtained the requisite number of signatures to place Measure No. 6 on the 1994 Oregon general election ballot. App. 53.

Measure No. 6 proposed adding a new § 22 to art. II of the Oregon Constitution. The new section *inter alia* prohibits a candidate for State elective office from using or directing campaign contributions other than contributions that have been contributed to the candidate by residents of the candidate's election district. At the November 1994 Oregon election, 628,180 Oregon voters voted to add § 22 to the Oregon Constitution. App. 54.

In December 1994 respondents filed this action in the District Court for the District of Oregon against the Secretary and Attorney General of the State of Oregon.

After alleging that 28 U.S.C. § 1331 and 42 U.S.C. §§ 1983 and 1988 granted the court jurisdiction to adjudicate respondents' claims, the complaint alleged *inter alia* that the prohibition § 22 imposes on the making of out-of-election district campaign contributions violates respondents' exercise of rights to free speech and political association guaranteed by the First and Fourteenth Amendments. GMER 12-30.

In July 1995 the District Court issued an opinion and order in which it invalidated § 22. Relying on *Buckley* and its progeny, the court concluded that the restrictions § 22 imposes on the making of campaign contributions are "not narrowly tailored to serve the state's interest in preventing corruption." App. 44. The District Court then entered a declaratory judgment and mandatory injunction. App. 47-48.

Petitioner Miller, and then the Secretary and Attorney General, separately appealed the District Court judgment to the Court of Appeals for the Ninth Circuit.[1] On

---

[1] To ensure that the District Court judgment would be appealed, petitioner Miller moved the court for leave to intervene as a matter of right. The District Court granted the motion, relying on *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), which instructs that there is "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene." This Court has questioned whether sponsorship of an initiative is evidence, in and of itself, that the sponsor has "a

August 11, 1998 two members of a three-judge panel of that court issued an opinion in which they affirmed the

---

sufficient 'personal stake' in a determination of the constitutional validity [of the initiative]" – *see Buckley, supra* at 12 – to have Article III standing. *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1068 (1997). That question need not be decided here. In the affidavit he filed in support of his motion to intervene, petitioner Miller attested that:

> I am a native of, and registered voter of, the State of Oregon who, since 1979, has resided in the City of Salem. I have voted in the previous four Oregon elections and intend to vote in the November 1996 Oregon state and federal election.
>
> In 1994 I was a candidate in the Republican Party's primary election for the party's nomination as its candidate for election to the Oregon House of Representatives from the thirty-first election district here in Salem. I won the primary election. But I lost the general election; although in losing I received forty-nine percent of the votes cast. Throughout my 1994 election campaign I refused to accept campaign contributions other than those contributed to my campaign by individuals who were residents of the thirty-first district. I intend to again seek elective public office. And when I do, I intend to again refuse to except [sic] campaign contributions except from individuals who are residents of the election district in which I am seeking election.

App. 52.

Petitioner Miller participated as a voter in the 1996 and 1998 Oregon elections. Independent of his status as the sponsor of the initiative that became art. II, § 22, of the Oregon Constitution, his status as a voter and as a former and future candidate grants the petitioner standing. *See Buckley, supra* at 7-8, 12 (challenge to constitutionality of 1974 FECA amendments by candidates for federal elective office, political parties, the New York Civil Liberties Union, the American

District Court judgment. In so holding, the affirming members of the panel adopted parts I-IV(A) of the opinion that Judge Burnetti, the third and presiding member of the panel, issued in which he concurred in part and dissented. App. 1-7.

After concluding in part III of his opinion that "Measure 6 [i.e., § 22] is a restriction on contributions and should be evaluated as such," App. 13 n. 1, in part IV(A) of the opinion Judge Burnetti concluded that the burden § 22 imposes on the making of campaign contributions is "not closely drawn to advance the goal of preventing corruption" because "Appellants [we]re unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." App. 16.

In part IV(B) of his opinion Judge Burnetti concluded first that "[w]ith the increasing importance of fundraising in elections generally, and in Oregon in particular, elections are for all intents and purposes are often decided

---

Conservative Union, the Conservative Victory Fund, and Human Events); *FEC v. Akins*, 118 S.Ct. 1777, 1787 (1998) (voters have standing to enforce FECA). Also, this Court repeatedly has granted campaign contributors standing to challenge the constitutionality of campaign finance statutes, *e.g.*, *First National Bank of Boston v. Bellotti*, *supra*; *Austin v. Michigan Chamber of Commerce*, *supra*. A voter has a considerably greater personal stake in the outcome of a controversy over the constitutionality of provisions that regulate the financing of elections in which he participates by voting and in which his representatives to the legislature are selected than does a campaign contributor who has no right to vote for candidates to whom the contributor makes contributions.

well before any resident steps into a voting booth." (citation omitted). Reasoning from this Court's holdings in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978); *Martinez v. Bynum*, 461 U.S. 321 (1983); *Shaw v. Reno*, 113 S.Ct. 2816 (1993), and *Austin v. Michigan Chamber of Commerce, supra*, he then concluded that the State of Oregon has an important interest "in protecting republican government by ensuring that elections are truly a measure of the preferences of those eligible to vote." App. 20. After determining that the prohibition on out-of-election-district campaign contributions that § 22 imposes is neither over- nor under-inclusive, Judge Burnetti concluded part V of his opinion by announcing that:

> States cannot pick and choose among voices in an effort to create an even playing field but they may take steps to ensure the integrity of political structures and processes. While Measure 6 [i.e., § 22] affects protected speech, it more closely resembles the latter category of state actions and therefor survives rigorous scrutiny under the First Amendment, and I would reverse the District Court's Opinion and Order and vacate its Declaratory Judgment and Mandatory Injunction.

App. 25.

The two affirming members of the panel rejected parts IV(B) and V of Judge Burnetti's opinion on the ground that "The right to a republican form of government has never before been recognized as a sufficiently important state interest." App. 4.

On September 18, 1998, the Ninth Circuit denied petitioner Gordon Miller's petition suggesting the appropriateness of a rehearing in banc. App. 49-50.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In *Buckley, supra* at 25, appellee Secretary of the Senate asserted that the primary governmental interest served by the contribution and expenditure limitations in the 1974 FECA amendments was "prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." The Court accepted both the description of the interest and its legitimacy. *Id.* 26-27.

In its decisions that have flowed from *Buckley*, the Court repeatedly has reaffirmed that "preventing the corruption or appearance of corruption of the political process" is an "important governmental interest." *California Medical Ass'n v. FEC*, 453 U.S. 182, 195 (1981). *Accord, Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309, 2313 (1996). However, in *FEC v. NCPAC*, 470 U.S. 480, 496-97 (1985), the Court noted that preventing corruption and the appearance of corruption of the electoral process are "the only legitimate and compelling interests *thus far* identified for restricting campaign finances." (emphasis added).

That careful turn of the phrase suggests that the Court recognizes that there are other, heretofore unidentified, governmental interests whose protection may justify a prohibition of certain categories of campaign contributions.

In part IV(B) of his opinion, Judge Burnetti concluded that the State of Oregon's interest "in protecting its republican form of government" is such an interest. App. 16. Because Judge Burnetti has raised a question of first impression that is of extraordinary importance regarding the extent to which the Founding Fathers intended the U.S. Constitution to empower Congress and State governments to regulate the conduct of elections to achieve the societal goals that they intended the Constitution to enshrine, this Court should decide the question about which Judge Burnetti and the other members of the panel on which he presided disagreed.

Article IV, § 4, of the U.S. Constitution requires the federal government to "guarantee to every State in this Union a Republican Form of Government." The debate over regulation of campaign financing has preoccupied Congress, State legislatures, and the federal and State judiciaries for more than a century. But until Judge Burnetti did so, few participants in that debate have considered the relationship between regulation of campaign contributions and protection of the republican principles the Founding Fathers intended the Guaranty Clause to safeguard.

As James Madison, the principal architect of the Constitution, and the other Constitutional Convention delegates intended, neither the federal government nor the

governments of the State of Oregon and the other forty-nine States are democracies. They are democratic *republics* whose geographies have been divided into election districts in which citizens who reside in a district periodically by voting select a resident of the district to represent the interests of all residents of the district in the national or State legislature.

That is the essence of the republican form.

Madison and the other Founding Fathers intended the republican form to accomplish a governmental objective of compelling importance: preventing control of legislatures from being seized by representatives of "factions" who would use their control to advantage the financial and policy interests of the factions of which they were members to the disadvantage of the public good. In THE FEDERALIST NO. 10, at 54 (James Madison) (Modern Library ed.), Madison defined a "faction" as: "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

Because "[t]he latent causes of faction are . . . sown in the nature of man," the "*causes* of faction cannot be removed."[2] Rather, "relief is only to be sought only in the

---

[2] Madison's theory that human beings naturally organize themselves into "factions" whose members have similar financial and policy interests is a quite modern view of human psychology. As Madison explained his theory to Thomas Jefferson in a letter written the month after the Constitutional Convention:

means of controlling its *effects*." (emphasis in original). *Id.* 55, 57. Assuming so, for Madison, requiring members of legislatures to be elected by voters who reside in discrete election districts was the means through which the deleterious effects of faction could be controlled. In THE FEDERALIST NO. 10, at 61, Madison described how requiring members of the U.S. House of Representatives to be elected by voters who reside in election districts located in different states would accomplish that objective as follows:

> The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may

---

> In all civilized Societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest. These classes may again be subdivided according to the different productions of different situations & soils, & according to different branches of commerce, and of manufactures. In addition to these natural distinctions, artificial ones will be founded, on accidental differences in political, religious or other opinions, or an attachment to the persons of leading individuals. However erroneous or ridiculous these grounds of dissention and faction, (sic) may appear to the enlightened Statesman, or the benevolent philosopher, the bulk of mankind who are neither Statesmen nor Philosophers, will continue to view them in a different light.

Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted at* 9 THE PAPERS OF JAMES MADISON 213 (1975).

> degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for the abolition of debts, for an equal division of property, or for any other improper or wicked project will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such malady is more likely to taint a particular county or district than an entire State.[3]

The theory that requiring members of Congress and State legislatures to be elected in discrete election districts would prevent representatives of factions from gaining undue influence over legislative decisionmaking presupposed that members of factions could influence

---

[3] In 1787 voters with similar "sentiments and views" had not yet divided themselves into the most influential of all "factions" – political parties. However, by the ante-bellum period, political parties, which by then were permanent institutions, were competing – by both fair means and foul – to win elections in order to seize control of the decisionmaking apparatus of State legislatures and Congress. To prevent the majority political party in the four states that still elected their representatives to the U.S. House of Representatives on a general ticket from unfairly electing party candidates to all seats, in 1842 Congress required all States to create congressional election districts in which one representative would be elected in each district. 5 Stat. 491 (1842). *See Ex Parte Yarbrough*, 110 U.S. 651, 660-61 (1884) (observing that the general ticket "gave an undue preponderance of power to the political party which had a majority of votes in [a] State").

election outcomes only by voting. In 1787 that assumption was reasonably accurate. A century later it no longer was. And it certainly no longer is true today.

Today, shareholders of corporations, members of labor unions, and contributors to political action committees organized by individuals (such as doctors or tobacco company executives) who have common financial interests, and members of organizations (such as the Sierra Club or National Rifle Association) who have common policy interests are members of "factions" within James Madison's definition of the term. And today in Oregon, those and other factions routinely use campaign contributions made to candidates for whom most faction members have no right to vote (because they do not reside in the candidates' election districts) to influence the outcome of elections for seats in the Oregon Legislature in order to elect candidates who, when they become legislators, will cast votes that will advantage the contributors' financial and policy interests.

At their 1994 election the people of Oregon determined, by voting to add § 22 to art. II of the Oregon Constitution, that the ability of members of factions to spend their money to influence the outcome of elections in which they have no right to vote poses a grave risk to the integrity of the republican form of the government of the State of Oregon.[4]

---

[4] Oregon voters are not alone in reasoning to that conclusion. Examples are legion. But the conclusion of former Senator Barry Goldwater, rendered after thirty-two years of observing the damage that campaign contributions made by factions had inflicted on the integrity of the congressional

In parts IV(B) and V of his opinion Judge Burnetti concluded that the interest of the people of Oregon in protecting the republican form of their State government justified their imposition of a prohibition on out-of-election-district campaign contributions.

This Court has not squarely considered the constitutional principle Judge Burnetti identified. But the Court has done so by inference.

The Court repeatedly has recognized that a State has an important interest in ensuring that nonresidents of an election district do not, by voting, influence the outcome of elections conducted in the district. In *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972), the Court recognized that preventing "voting by nonresidents, either singly or in

---

electoral process, is particularly instructive. According to Senator Goldwater:

> [T]he massive involvement of PAC's in Federal elections is distorting the entire election process . . . Many people look on successful candidates as being bought and paid for by whomever gave the most money. The average voter, who cannot make a large campaign gift, feels his or her vote means nothing in deciding public policy. As far as the public is concerned, it is the PAC's and the special interests they represent, and not the people, who set the country's political agenda and control a candidate's position on important issues. PAC money is discouraging voter turnout and ruining whatever is left of the public's perception that elected officials are what James Madison intended us to be, agents of the sovereign people, and not a front for narrow factions.

*Proposed Amendments to the Federal Election Campaign Act of 1971: Hearings Before the Senate Comm. on Rules and Administration*, 99th Cong. 19-20 (1985) (statement of Senator Barry Goldwater).

groups" is "a legitimate and compelling government goal." In *Marston v. Lewis*, 410 U.S. 679, 680 (1973), the Court recognized that "States have valid and sufficient interests" in protecting their electoral processes "from possible frauds" by ensuring that individuals who are not bona fide residents of an election district in which an election is conducted are prevented from influencing the outcome of the election by voting. And in *Holt Civic Club v. City of Tuscaloosa, supra*, the Court held that nonresidents of an election district have no right to vote in elections conducted in the district, even if such nonresidents may be adversely affected by ordinances enacted by winning candidates. *Id.* 68-69 (summarizing that "our cases have uniformly recognized that a governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders").

Why, if a State has a cognizable constitutional interest in preventing an individual who is not a resident of an election district from influencing the outcome of an election by voting, does the State not have a cognizable constitutional interest in preventing the same individual from influencing the outcome of the same election by contributing money to a candidate – either directly or by washing the money through a corporation, union, PAC, or other organization? Or, to pose the question conversely, what constitutionally protected interest does an individual have in the outcome of an election in which the individual has no right to vote?

When it prohibited foreign nationals from making campaign contributions "in connection with an election

to any political office," Congress long ago concluded that such an individual has no interest. *See* 2 U.S.C. § 441e.[5]

If an individual who is not a resident of an election district has no constitutionally protected interest in the outcome of an election conducted within the district, but does, as *Buckley* instructs, have rights to free speech and political association that the First Amendment protects, those rights can be exercised by making independent expenditures, rather than campaign contributions. *Cf.*, *Buckley, supra* at 22 (observing that limiting an individual's opportunity to make a campaign contribution allows the individual to spend the same amount of money on "direct political expression" and that, as a result, there will be no "reduc[tion of] the total amount of money potentially available to promote political expression"). As Judge Burnetti concluded in part IV(B) of his opinion, "[n]othing in Measure 6 [i.e., art. II, § 22] prevents out-of-district and out-of-state residents from making independent expenditures on behalf of candidates and issues." App. 23.

---

[5] More recently, on August 6, 1998 the U.S. House of Representatives passed H. R. 2183, a bill whose enactment would have made numerous changes to the rules that govern the financing of federal elections. *See* 144 CONG. REC. H7330 (daily ed. Aug. 6, 1998). The exercise by citizens who are seventeen years old or younger of the rights to free speech and political association is protected by the First and Fourteenth Amendments. *Erznoznik v. City of Jacksonville*, 422 U. S. 205, 212 (1975). But because he or she has no right to vote, § 507 of H. R. 2183 prohibited an individual who is seventeen years old or younger from contributing to candidates and political parties. Section 507 is reprinted at 144 CONG. REC. H4795 (daily ed. June 18, 1998).

Finally, but most importantly, in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986), the Court acknowledged "that it is important to protect the integrity of the marketplace of political ideas." And in *Austin v. Michigan Chamber of Commerce, supra* at 660, the Court recognized that a State has an interest in ensuring that political debate in that marketplace is not corruptly distorted by "immense aggregations of wealth" that are expended to purchase political speech to influence the outcome of an election in a situation in which the amount of purchased speech bears "little or no correlation to the public's support [for the 'political ideas' that the speech espouses]"). In *Austin*, the Michigan Legislature was concerned about corporations spending money from "political war chests" to unfairly influence political debate and election outcomes. But no matter whose they are, all "political war chests" pose the same threat. And that threat is compounded when, rather than being spent to finance independent expenditures that voters can identify as such, money from a political war chest is contributed to a candidate whose campaign spends the contribution to purchase speech that the candidate labels as his or her own.[6]

---

[6] For example, prior to the 1992 Oregon election, the Oregon Education Association PAC – a "faction" whose members are teachers – contributed $311,924 to candidates for the Oregon Legislature. GMER 100. And prior to the 1994 Oregon election, Oregon businessman Mark Hemstreet contributed $166,650. If the PAC and Mr. Hemstreet had spent $311,924 and $166,650 on independent expenditures that were labeled as such, Oregon voters would have been able to consider the PAC's and Mr. Hemstreet's recommendations regarding which candidates supported the PAC's views on

In elections, both in the State of Oregon and other States, campaign contributions that corporations, unions, PACs, and other organizations make from their political war chests to candidates seeking election in election districts other than the districts in which the corporations' shareholders and the organizations' members reside are debasing debate in the political marketplace. By doing so, the same contributions also are debasing the republican form of government that the Founding Fathers intended election district boundaries to safeguard. For that reason, voters in every election district in the nation have an important interest in this Court deciding whether the U.S. Constitution prohibits States and Congress from prohibiting out-of-election-district contributions.

## II. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Since *Buckley*, the Court repeatedly has held that Congress and States have a compelling interest in protecting the integrity of their electoral processes from both

---

education policy and Mr. Hemstreet's views on tort reform. Instead, because the PAC and Mr. Hemstreet spent their money by making contributions, the speech the money purchased was mislabeled as the speech of the candidates to whom the contributions were made. The mislabeling created the impression that the candidates who received the contributions were supported by voters in their election districts when they actually were supported by members of the Oregon Education Association PAC and by Mr. Hemstreet (who, because they were not residents of the candidates' election districts, had no right to influence the outcome of the candidates' elections by voting).

corruption and the appearance of corruption, *e.g., FEC v. Nat. Right to Work Comm.*, 459 U.S. 197, 208 (1982). And the Court has held that, if they are necessary to advance that interest, statutes may prohibit certain categories of campaign contributions, *e.g., Austin v. Michigan Chamber of Commerce, supra.* But if the rule is clear,[7] implementation of the rule requires consideration of the subsidiary question: "What is 'corruption' of the electoral process?"

In *Buckley, supra* at 27-28, the Court rejected the contention that Congress's interest in preventing corruption of the electoral process is limited to preventing campaign contributors from offering, and candidates from accepting, contributions as bribes because "the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." In *Buckley,* the Court also instructed that the electoral process is corrupted if, as a consequence of the pernicious influence of certain categories of campaign contributions, voters' "confidence in the system of representative government is . . . eroded to a disastrous extent." (citation omitted). *Id.* 27

Expanding on that theme, in *FEC v. NCPAC, supra* at 497, the Court explained that, in the campaign finance

---

[7] Implementing the rule, Congress has prohibited corporations and labor organizations, 2 U.S.C. § 441b, persons who hold government contracts, 2 U.S.C. § 441c, foreign nationals, 2 U.S.C. § 441e, and Federal Election Commission employees, 5 U.S.C. § 7323(b)(1), from making campaign contributions. Congress also has prohibited federal employees, including members of the staffs of members of Congress, from making campaign contributions to their employers, 18 U.S.C. § 603.

context, "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves *or infusions of money into their campaigns*. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." (emphasis added).

A hallmark is a "mark or special indication of genuineness" or a "distinguishing feature or characteristic." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONATY OF THE ENGLISH LANGUAGE, at 639 (1983).

By definition, a hallmark is not the entire thing that it is the hallmark of. But when it concluded that "all out-of-district contributions [do not] lead to the sort of corruption discussed in *Buckley*" and invalidated art. II, § 22, of the Oregon Constitution, the Ninth Circuit panel reasoned to that result by assuming that the hallmark example of corruption that the Court identified in *NCPAC* is the *only* kind of corruption of the electoral process that *Buckley* recognizes that the State of Oregon has an interest in preventing. According to the panel, citing *NCPAC* as the controlling authority: "The Supreme Court has defined corruption associated with campaign contributions as 'financial quid pro quo: dollars for political favors.' " App. 15.

In addition to misreading *NCPAC*, the panel's conclusion that the exchange of "dollars for political favors" is the exclusive means through which campaign contributions can corrupt the electoral process ignores other important holdings of this Court announced in decisions that have evolved from *Buckley*.

Those holdings reaffirm that "[t]he Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981). The Court also has recognized that within that marketplace the protection of the integrity of public debate about "political ideas" is a constitutional value of paramount importance. *FEC v. Mass. Citizens for Life*, *supra* at 257. And the Court has acknowledged that campaign contributions can corrupt debate in the "marketplace of political ideas" by misinforming voters regarding the extent of public support for the positions espoused in the political speech that the money has purchased. *Cf. Austin v. Michigan Chamber of Commerce*, *supra* at 660.

Over time, that type of corruption subverts the electoral process by eroding voter confidence in the integrity of representative government as readily as *quid pro quo* "dollars for political favors" corruption. Because it does, the Ninth Circuit panel's misreading of, and misreliance on, *NCPAC* to invalidate art. II, § 22, of the Oregon Constitution so departs from the holdings of *Buckley* and its progeny regarding a question of paramount importance, not only to the State of Oregon but to Congress and all States that are struggling to craft campaign finance systems that safeguard the integrity of their electoral processes without unnecessarily abridging rights of campaign contributors protected by the First Amendment, as to call for an exercise of the Court's supervisory power.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD CRAIG MITCHELL

*Counsel for Petitioner*

NOVEMBER 1998

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| FRED VANNATTA; GEORGE BOEHNKE; CENTER TO PROTECT FREE SPEECH, INC., *Plaintiffs-Appellees,* v. PHIL KEISLING, in his capacity as Secretary of the State of Oregon; TED KULONGOSKI, in his capacity as Attorney General of the State of Oregon, *Defendants,* and GORDON MILLER, *Defendant-intervenor-Appellant.* | Nos. 95-35998<br>95-35999<br>D.C. No.<br>CV-94-01541-JO<br>OPINION |

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
July 11, 1996 – Portland, Oregon

Filed August 11, 1998

Before: Warren J. Ferguson and Melvin Brunetti, Circuit Judges, and Samuel P. King,* District Judge.

---

* Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Opinion by Judge Ferguson; Partial Concurrence and Partial Dissent by Judge Brunetti

---

## COUNSEL

John R. Faust, Jr., Schwabe, Williamson & Wyatt, Portland, Oregon; John A. DiLorenzo, Jr., Hagen, Dye, Hirschy & DiLorenzo, Portland, Oregon, for plaintiffs-appellees Van Natta, et al.

Rives Kistler, Deputy United States Attorney, Salem, Oregon, for defendants-appellants Keisling, et al.

Donald Craig Mitchell, Anchorage, Alaska, for appellant Gordon Miller.

Jamin B. Raskin, Washington, D.C.; Abigail Turner, and John C. Bonifaz, Boston, Massachusetts, for the amicus.

---

## OPINION

FERGUSON, Circuit Judge:

### I.

We adopt as the unanimous opinion of this panel all of Judge Brunetti's concurring opinion set forth in parts I, II, and III. We also adopt Part IV(A), which declares that Measure 6 is not closely drawn to advance the goal of preventing corruption and fails to pass muster under the First Amendment.

II.

We reject Judge Brunetti's argument in dissent, Parts IV(B) and V, that Measure 6 is valid because it prevents a distortion of the republican form of government in the State of Oregon. It could be argued that the initiative process itself distorts the republican form of government.

III.

Measure 6 was on the Oregon Ballot with Measure 9. That Measure was a set of statutes also adopted by the initiative process. The Oregon Supreme Court in *Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) held that the statutes in Measure 9 which, like Measure 6, limited or banned campaign contributions, violated the Free Speech provisions of the State Constitution. One matter that is common in both Measures is the limitation upon candidates using campaign contributions from individuals who reside outside the candidate's voting district. In both Measures, the meaning of "individuals", is at issue. The Oregon Supreme Court declared that on its face it is unclear whether the word "individuals," as used in Measure 6, applies to the use of contributions from corporations, businesses, labor unions or PAC's, and therefore was over inclusive and must fail under the Oregon Constitution. In accordance with OR. REV. STAT. § 28.200 (1995), the panel certified to the Oregon Supreme Court three questions:

(1) Is Measure 6 valid under the Constitution of Oregon?

(2) How is Article II, section 22 to be interpreted in light of competing provisions of

the Oregon Constitution, including Article I, section 8?

(3) Does the word "individuals" as used in section 1 of Measure 6 include corporations, PACs and unions?

The Oregon Supreme Court has rejected the certification.

IV.

The issue, which appellants describe in several different ways, involves protecting the integrity of republican government by assuring that representatives are truly selected by their own constituents.

Appellants argue that the state interest in a republican form of government supports Measure 6. They contend that Measure 6 advances that interest by preventing those who are ineligible to vote from influencing the outcome of elections. The right to a republican form of government has never before been recognized as a sufficiently important state interest. In *Whitmore v. Federal Election Comm'n*, 68 F.3d 1212 (9th Cir.1995), a candidate and a voter sought an injunction to prohibit candidates from accepting out-of-state campaign contributions. The plaintiffs asserted that such contributions violated, inter alia, their right to a republican form of government. This Court stated:

> Plaintiffs argue that the Constitution entitles them to representation by someone not beholden to any citizen of another state. They present a historian's affidavit that the Founding Fathers would have been "shocked" at out-of-state contributions to a congressional candidate . . . Neither the Constitution nor the

United States Code affords plaintiffs any support for their political theory.

This Court held plaintiffs' claim to be unsupported by precedent and dismissed it as frivolous. *Whitmore*, 68 F.3d at 1216. Although *Whitmore* addresses out-of-state rather than out-of-district contributions, its holding underscores the lack of support for any claim based on the right to a republican form of government.

Appellants nonetheless present several cases which, they argue, may be taken together to expand the "narrow exception to the rule that limits on political activity [are] contrary to the First Amendment." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981). We now distinguish each case in turn.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court upheld a Michigan law preventing corporations from using general treasury funds to support or oppose candidates for state office. The Court reasoned that corporations use state-created advantages to dominate both the economic and the political arena. *Austin*, 494 U.S. at 659 (citing *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)). The Court held that the statute "ensures that expenditures reflect actual public support for the political ideas espoused by corporations . . . corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660.

The Court did not define "actual public support," but appellants would like us to read it as support for Oregon's limitation of out-of-district contributions. The holding in *Austin*, however, addresses the "unique state-conferred corporate structure that facilitates the amassing of large corporate treasuries" and the attendant risk of unfair corporate influence in the electoral process. *Id.* The Court did not concern itself with a distinction between in-district and out-of-district corporations. Therefore, we conclude that the state interest defined in *Austin* does not support Measure 6.

In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), the Supreme Court upheld Alabama legislation that extended police and other city powers over non-residents living within three miles of city borders. The Court concluded that the state did not have to provide those non-residents with the right to vote in city elections. *Id.* at 69.

The *Holt* Court emphasized that it was not enough for the non-residents to show that they were affected by the city's policies because many non-residents are affected by many cities' decisions. *Id.* Regardless of those extraterritorial effects, non-residents do not have a right to "participate in the political processes bringing it about." *Id.* "[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Id.* at 68-69. It is true that states have wide latitude in determining requirements for voting. However, the political process at issue in *Holt* was the right to vote and not the right to First Amendment

speech. Therefore, *Holt* does not support the republican form of government argument made here.

The Supreme Court has suggested that states have a strong interest in ensuring that elected officials represent those who elect them. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 650 (1993) (elected officials representing one interest group rather than their entire constituency is a cognizable harm under the Fourteenth Amendment). However, in *Shaw*, the Court was addressing the inverse situation: representatives ignoring much of their constituency in favor of one group of constituents, rather than out-of-district concerns. *Id.* Appellants read *Holt* and *Shaw* out of context and they do not provide authority for this Court to uphold Measure 6.

## V. *Conclusion*

Measure 6 does not survive scrutiny under the First Amendment and is not saved by the argument that it protects the republican form of government.

The District Court's Opinion and Order and its Declaratory Judgment and Mandatory Injunction are AFFIRMED.

---

BRUNETTI, Circuit Judge, concurring in part and dissenting:

The state of Oregon amended its constitution to prohibit state candidates from using or directing any contributions from out-of-district residents and to penalize candidates when more than 10% of their total "funding"

comes from such individuals. The amendment was challenged under several provisions of the constitution and was struck down, in a summary judgment order, by the district court under the First Amendment. Viewing the evidence in a light most favorable to appellants, we review the award of summary judgment *de novo, Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

I.

In November of 1994, the voters of Oregon amended their constitution by passing Ballot Measure 6 ("Measure 6"). Measure 6 provided:

> Be it enacted by the People of Oregon:
>
> SECTION 1. For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donations were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by the federal, state, or local government for purposes of campaigning for an elected public office.
>
> SECTION 2. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and

the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

SECTION 3. A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected office.

SECTION 4. A violation of Section (3) shall be an unclassified felony.

Although Measure 6 does not expressly limit its application to state races, it amends Article II of the state constitution which governs state elections. The parties do not argue Measure 6 applies to federal elections and to the extent it attempted to do so, it would be preempted by the Federal Election Campaign Act.

Plaintiffs sought a declaratory judgment that Measure 6 is facially unconstitutional. Plaintiffs VanNatta, Gill, and the Center To Protect Free Speech ("Center") claimed that they wished to contribute to out-of-district candidates, Plaintiff Boehnke claimed that he wished to

accept donations from non-residents of his district, Plaintiff Smith claimed that he refused donations from plaintiffs Gill and VanNatta because of Measure 6. Several parties intervened including Gordon Miller, the sponsor of Measure 6, who was allowed to intervene for the purpose of appealing the district court's judgment.

Defendants presented considerable evidence demonstrating the prevalence of political action committee money in Oregon state races. As of 1992, candidates spent an average of $38,000 on state house races and $49,000 on state senate races. House candidates received 81% of their money from PACs and corporations, senate candidates received 75% from those sources. Individual contributors accounted for 13% of contributions in house races and 15% in senate races in 1992. Defendants also presented statistical and anecdotal evidence suggesting a strong correlation in Oregon between receiving funds and winning elections.

The district court granted summary judgment for the plaintiffs. Applying strict scrutiny, the court rejected the measure as not narrowly tailored to prevent corruption because it prevented non-corrupt out-of-district contributions, failed to thwart in-district corruption, and failed to prevent large out-of-district contributions so long as they do not exceed 10% of the total. Defendants appealed.

## II. *Applicability of the First Amendment*

Contributions to political campaigns are protected speech under the First Amendment. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). Appellants, however, argue that Measure 6 does not burden the rights

of contributors VanNatta, Gill, and the Center because it does not prevent the acceptance of contributions, but rather the use of certain contributions by the candidate. Under Measure 6, candidates could accept unlimited donations from out-of-district residents so long as they do not "use or direct" them. While Measure 6's sanctions only apply if 10% of a candidates' "total campaign funding" is in violation, it prohibits the use or direction of any non-conforming contributions.

Appellants' argument that contributors are not burdened relies on *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), in which the Supreme Court upheld limits on contributions, reasoning that the free speech value of contributing lay in the "symbolic expression of support" not the total amount. Based on that rationale, they argue that Measure 6 in no way detracts from the symbolic act of contributing because it does not prevent contributions, but only the use of contributed money.

Appellants' argument only makes sense in the abstract. In reality campaigns will have no incentive to accept money which they cannot legally spend. To do so would invite violations of Measure 6 and a host of potential ethical landmines. In fact, appellees attested that an out-of-district candidate refused to accept their donations because of Measure 6. As the statute has caused campaigns to refuse to accept these unusable contributions, the First Amendment rights of contributors are implicated. *See Service Employees Int'l Union, AFL-CIO, CLC v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1321 (1992). In *Service Employees*, this court concluded that time limitations on the amount of contributions a candidate could receive impermissibly discriminated against challengers.

*Id.* It held that contributors had standing to challenge the measure as violating their own First Amendment rights. *Id.* at 1316. "If Proposition 73 discriminates against challengers by limiting their opportunities to accept contributions, then it necessarily discriminates against contributors who wish to associate themselves with challengers." *Id. Cf. Renne v. Geary*, 501 U.S. 312, 320 (1991) ("respondents of course have standing to claim that § 6(b) has been applied in an unconstitutional manner to bar their own speech"). Therefore, Measure 6 does implicate the contributing appellees' First Amendment rights because it limits the ability of candidates to accept their donations. *See Service Employees*, 955 F.2d at 1321.

## III. *Level of Scrutiny*

Restrictions on contributions to campaigns are subjected to less exacting scrutiny than restrictions on independent expenditures in support of a campaign. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("we have consistently held that restrictions on contributions require less compelling justification than restrictions on independent expenditures"); *Service Employees*, 955 F.2d at 1322. Thus while contribution limitations are reviewed under a "rigorous" level of scrutiny, they are not reviewed under strict scrutiny. *Id.* Restrictions on contributions are upheld when the "state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Service Employees*, 955 F.2d at 1322 (quoting freedom of association analysis in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). While the test is

less stringent than strict scrutiny, "the test is still a rigorous one." *Id.*

Appellees argue that the level of scrutiny should be strict because Measure 6 does more than restrict the amount non-residents can contribute in that it flatly prohibits such contributions.[1] Their argument finds support in *Buckley* in which the Supreme Court reasoned that the Federal Election Campaign Act's restrictions on contributions were less drastic because they only limited the amount, thereby permitting the symbolic act of contributing to a worthy candidate. 424 U.S. at 21. The Court, however, also noted that contribution limits did not prevent contributors from independently discussing candidates and issues. *Id.*

In any event, this court has applied less-than-strict, rigorous scrutiny to total restrictions on contributions. *Service Employees*, 955 F.2d at 1322. In *Service Employees*, we reviewed a California Initiative which banned campaigns from contributing to another campaign. *Id.* at 1315. We struck down the provision under the rigorous

---

[1] Appellants are in disagreement over the level of scrutiny. The state argues that less than strict scrutiny should be applied. Appellant Miller, however, concedes that strict scrutiny is applicable because he understands Measure 6 to be a contribution limit on candidates. Miller relied on the discussion in *Buckley* of limits on personal expenditures by candidates. However, nothing in Measure 6 prevents candidates from spending their own money or unlimited amounts of money contributed by in-district residents. *Cf. Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213, 216 (Mass. 1994) (advisory opinion) (concluding that aggregate limit on total contributions was an expenditure limit). Thus Measure 6 is a restriction on contributions and should be evaluated as such.

scrutiny derived from *Buckley*. Thus, under the law of this circuit, we apply rigorous, rather than strict, scrutiny to Measure 6. *See id.* Measure 6 can survive rigorous scrutiny only if it is closely drawn to advance a sufficiently important interest. *Id.*

The National Voting Rights Institute ("Institute") argues in its amicus brief that the statute should be reviewed under the balancing test laid out in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). In *Anderson*, the Court considered challenges to candidate filing deadlines. The Court noted that while voters' free speech rights are affected by restrictions on candidates, the process of managing elections necessarily involves extensive state regulation. 460 U.S. at 788. The Court articulated a framework for weighing the competing interests affected by election laws. *Id.* at 789. The Supreme Court has not applied this test to campaign contribution restrictions which more directly infringe on speech rights and which are not necessarily an integral aspect of a state's management of elections. Thus the rigorous test outlined in *Service Employees* is the appropriate level of scrutiny.

## IV. *Measure 6*

*Sufficiently Important State Interest*

There are essentially two purported interests advanced by Measure 6. One is corruption. As the district court concluded, Measure 6 is both under-inclusive and over-inclusive with respect to curbing corruption and thus corruption is an insufficient state interest to sustain the measure. A second interest, which appellants describe

in several different ways, involves protecting the integrity of republican government by assuring that constituents are truly selecting their representatives.

A. *Curbing Corruption*

The district court defined the state's interest in Measure 6 as preventing political corruption. The court then rejected the measure as not being narrowly tailored to prevent corruption because it prevented non-corrupt out-of-district contributions, failed to thwart in-district corruption, and failed to prevent large out-of-district contributions so long as they do not exceed 10% of the total.

Even applying the less stringent rigorous test, to the extent one views the state's interest as preventing corruption, Measure 6 still fails to pass scrutiny for the reasons stated by the district court. *See Service Employees*, 955 F.2d at 1312. The Supreme Court has defined corruption associated with campaign contributions as "financial quid pro quo: dollars for political favors." *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985). In *Service Employees*, this court rejected California's asserted interest in preventing corruption as a justification for banning intra-campaign donations. *Id.* Citing *Buckley*, the court reasoned that corruption stems from large campaign donations and not small ones. *Id.* As the California initiative did not distinguish on the basis of size of donation, this court concluded that the measure was not closely drawn. *Id.*

The *Service Employees* rationale is equally applicable here. Measure 6 bans all out-of-district donations, regardless of size or any other factor that would tend to indicate

corruption. Appellants are unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*. *See Harwin v. Goleta Water Dist.*, 953 F.2d 488, 490 (9th Cir.1991) (government did not show that ordinance's distinction between contributions from applicants and opponents served to prevent either corruption or the appearance of corruption). *Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir.1995) (holding limits on the size of contributions were not closely drawn to reducing corruption as state made no showing that small contribution limits were necessary to curb corruption). Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment.

Judge Ferguson and Judge King adopt this conclusion. To this point, the panel is unanimous.

B. *Republican Form of Government*

Judge BRUNETTI, dissenting:

At this point I must part with Judge Ferguson and Judge King with regard to the appellant's portrayal of the state's interest not so much as preventing corruption but as presenting a distortion of the state's republican form of government. The majority opinion rejects this argument, however, I conclude that Oregon has a sufficiently important interest in protecting its republican form of government and I dissent from the affirmance of the district court.

Appellant argues that Measure 6 advances this interest by preventing those who are ineligible to vote from influencing the outcome of elections. We can consider any interest which Measure 6 serves in assessing the constitutionality of the provision. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983).

In several cases the Supreme Court has emphasized the right of states and cities to reserve their political processes and resources for their own residents. In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70 (1978), the Court upheld Alabama legislation that extended police and other city powers over non-residents living within three miles of city borders. The Court concluded that the state did not have to provide those non-residents with the right to vote in city elections. *Id.* at 70.

The *Holt* Court emphasized that it was not enough for the non-residents to show that they were affected by the city's policies because many non-residents are affected by many cities' decisions. *Id.* at 69. Regardless of those extraterritorial effects, non-residents do not have a right to "participate in the political processes bringing it about." *Id.* "[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Id.* at 68.

Similarly, in *Martinez v. Bynum*, the Court upheld a Texas provision that allowed public schools to deny access to children who live apart from their parents if the child's presence in the district is "for the primary purpose of attending free public schools." 461 U.S. 321, 323 n.1 (1983). The Court reasoned that the measure furthered

"the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Id.* at 328.

In other contexts the Supreme Court has suggested, sometimes strongly, that states have a strong interest in ensuring that elected officials represent those who elect them. *See, e.g., Shaw v. Reno,* 113 S.Ct. 2816, 2828 (1993) (elected officials representing one interest group rather than their entire constituency is a cognizable harm under the fourteenth amendment). In *Shaw,* the Court was addressing the inverse situation: representatives ignoring much of their constituency in favor of one group of constituents, rather than out-of-district concerns. *Id.* The analysis, however, underscores the importance of preserving the ties between elected officials and those who elect them. *See id.*

In *Austin v. Michigan Chamber of Commerce,* the Court upheld a statute which prohibited all corporations, not just out-of-district, from spending money from their general funds on elections. 494 U.S. 652 (1990). ("The Act does not attempt to equalize the relative influence of speakers on elections, rather it ensures that expenditures reflect actual public support for the political ideas espoused by corporations . . . corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions"). *Id.* at 660. While the Court did not discuss what is meant by "actual public support," in the context of protecting elections from unfair influences, the concept is by definition limited to those who are eligible to vote, i.e. district residents. *See id.*

In voting cases, the Court has emphasized both the need for equal representation as well as the latitude states have in determining requirements for voting. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 694 (1989); *Carrington v. Rash*, 380 U.S. 89, 91 (1965) ("states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised"). In *Morris*, the Court struck down a New City municipal board which afforded each borough of the city equal representation despite substantial differences in population. In doing so, the Court emphasized that equal representation was crucial to assuring that each citizen equally participates in government because voting is the only way in which most residents participate in the political process. *Morris*, 489 U.S. at 693. In *Carrington*, the Court struck down a Texas statute which prevented service personnel from voting so long as they remained active members in the military. 380 U.S. at 97. The Court, however, reaffirmed the wide latitude enjoyed by states in establishing residency requirements, as long as the states do not violate the fourteenth amendment. *Id.* at 91.

While none of the cases discussed above are directly on point, taken together they suggest that a state has a sufficiently strong interest in protecting the integrity of electoral district lines. If states have flexibility in determining who is a resident for voting purposes and in taking steps to make sure non-residents do not have access to some state services, it follows that states also have a strong interest in making sure that elections are decided by those who vote. The Supreme Court has come very close to saying as much in *Shaw*, *Holt*, and *Austin*.

With the increasing importance of fundraising in elections generally, *Buckley*, 424 U.S. at 19, 22, and in Oregon in particular, elections are for all intents and purposes are often decided well before any resident steps into a voting booth.

Thus the Supreme Court's traditional emphasis of states' interest in managing elections, assuring that only residents vote, and safeguarding resources for bona fide residents supports Measure 6 because appellants have presented considerable evidence that campaign financing strongly influences Oregon elections. As this was a grant of summary judgment for appellees, that evidence must be viewed in the light most favorable to appellants. *Warren*, 58 F.3d at 441. Furthermore, under rigorous scrutiny the state need only demonstrate a sufficiently important interest. *Service Employees*, 955 F.2d at 1322. I conclude that Oregon has a sufficiently important interest in protecting republican government by ensuring that elections are truly a measure of the preferences of those eligible to vote.

The inquiry thus turns to whether Measure 6 is closely drawn to serve this interest. *Id.* Legislation is closely drawn when it is not over or under inclusive. *See id.* Appellees primarily contend that protecting representative government is not a compelling interest. They also maintain, however, that Measure 6 is underinclusive because it permits in-district donations that "far exceed the candidate's 'actual support within the district' " and overinclusive because it prevents small out-of-district contributions "that could not possibly erode or even appear to erode anyone's vote."

The underinclusive argument misses the mark. The fact that some in-district residents will donate more than others does not detract from the state's interest in ensuring that elections are truly a forum for constituents to select a representative. The Supreme Court has cautioned against trying to equalize voices based on wealth. *Buckley*, 424 U.S. at 48-49. Even if a small group of in-district residents who hold a minority viewpoint contribute a majority of a candidates' donations, the decision-making process has remained entirely within the district.

The overinclusive argument is stronger. Appellees frequently refer to the hypothetical candidate's out-of-district mother who wants to donate a dollar to her child's campaign. To the extent that one views the state's interest as preventing non-residents from unduly influencing the outcome of an election, Measure 6 is overinclusive in that it prohibits donations which will have no influence.

The state's interest, however, is more appropriately characterized as ensuring that only those who are constituents participate in the electoral process. Toward that end, Measure 6 is not over-inclusive in that it prohibits every non-district resident, but no residents, from participating in the electoral process. *See Harwin*, 953 F.2d at 490. Unlike the Goleta Water District in *Harwin*, appellants have presented considerable evidence indicating that out-of-district contributions determine in-district elections and thus have shown that the distinction serves the government's interest. *See id.*

Moreover in *Austin*, the Court rejected an over-inclusiveness argument that not all corporations have

vast resources. 494 U.S. at 661. "We accept Congress' judgment that is it [sic] the potential for such influence that demands regulation." *Id.* Measure 6 is a manifestation of the state of Oregon's judgment that out-of-district donations have the potential for undue influence. Under *Austin*, there is precedent for according that judgment considerable deference. As the rigorous test requires only that the measure be closely drawn to advance the interest, rather than narrowly tailored, Measure 6 is sufficiently closely drawn to survive rigorous scrutiny.

Appellees argue that the measure denies out-of-district residents and out-of-state residents any voice in matters which may strongly affect their interests. In *Buckley*, however, the Supreme Court emphasized the more limited speech value associated with contributions as opposed to direct expenditures:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication . . . While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

424 U.S. at 20-21. Part of the *Buckley* court's analysis emphasized that in only limiting the amount of contributions the Act still allowed the symbolic gesture of contributing. *Id.* In striking down expenditure limitations, however, the Court commented that they "limit political

expression at the core of our electoral process and of the First Amendment freedoms." *Id.* at 39. *See also Massachusetts Citizens*, 479 U.S. at 259-60 ("we have consistently held that restrictions on contributions require less compelling justification than restrictions on independent expenditures").

Nothing in Measure 6 prevents out-of-district and out-of-state residents from making independent expenditures on behalf of candidates and issues. Appellee discusses stockholders and state employees as two groups that will be denied "any voice" in state elections under Measure 6. That argument is plainly false because these groups will be allowed to make independent expenditures in an effort to persuade the voters of Oregon that a particular candidate should be elected or a particular issue warrants closer attention. *See Austin*, 494 U.S. at 660 (the act was not an absolute ban because it permitted independent expenditures from segregated funds). Thus while it could be argued that cases like *Holt*, which allows cities to exercise jurisdiction over non-residents, heighten the need for non-resident participation in elections through contributions, non-residents can always resort to independent expenditures.

Appellees also rely heavily on *Whitmore v. Federal Election Commission*, 68 F.3d 1212, 1216 (9th Cir.1996). In *Whitmore*, a third party candidate sought an injunction ordering candidates not to accept out-of-state contributions because such contributions violate their right to republican government. *Id.* The court held that the claim was frivolous noting that neither the constitution nor the federal statutes provide any support. *Id.* The court went on to note that the district court could not have granted

the injunction in view of contributor's First Amendment rights. The amended opinion concluded that "such management of the system of political expression **may** violate the rights of out-of-state contributors." *Id.* (emphasis added).

The use of the word "may" indicates that the *Whitmore* court did not intend to resolve the First Amendment rights of the contributors. It was sufficient for them to hold that federal law did not prohibit out-of-state contributions. That holding has no bearing on this case because Measure 6 does prohibit out-of-state contributions and thus, unlike in *Whitmore*, the question of whether such a prohibition is in violation of the First Amendment is squarely before this court.

The *Whitmore* court was apparently concerned about the Supreme Court's admonition in *Buckley* against states favoring the speech of certain segments of the population. 68 F.3d at 1216. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

Measure 6 clearly favors the voices of in-district residents over those of out-of-district residents but no more so than residency requirements for voting. In *Buckley*, however, the Court was considering a proposal that attempted to limit the ability of the wealthy to drown out the voices of those with fewer resources. 424 U.S. at 48. Measure 6 discriminates only on the basis of in-district residency and only affects contributions, not independent expenditures.

Finally, it is important to note that Measure 6 does not prevent the hypothetical candidate from donating to her child's campaign. Measure 6 does prohibit her child from using the funds but only penalizes a candidate when more than 10% of his "total campaign funding" is in violation of the provision. Thus while the statute inhibits out-of-district donations such that it implicates the First Amendment, it does not require our hypothetical candidate to return his mother's donation. The 10% floor thus essentially functions as a savings clause.

V.

States cannot pick and choose among voices in an effort to create an even playing field but they may take steps to ensure the integrity of political structures and processes. While Measure 6 affects protected speech, it more closely resembles the latter category of state actions and therefore survives rigorous scrutiny under the First Amendment, and I would reverse the District Court's Opinion and Order and vacate its Declaratory Judgment and Mandatory Injunction.

**APPENDIX B**

IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| FRED VANNATTA, et al., Plaintiffs, | ) | Civil No. 94-1541-JO |
| v. | ) | |
| PHIL KEISLING, in his capacity as Secretary of the State of Oregon, et al., Defendants. | ) | OPINION AND ORDER |

John R. Faust, Jr.
SCHWABE WILLIAMSON & WYATT
1211 S.W. Fifth Avenue, Suite 1600-1800
Portland, OR 97204-3795

John A. Di Lorenzo, Jr.
Michael E. Farnell
HAGEN DYE HIRSCHY & DiLORENZO
One S.W. Columbia Street, Suite 1900
Portland, OR 97258

Attorneys for Plaintiffs

Eric James Bloch
Katherine Green Georges
DEPARTMENT OF JUSTICE
1162 Court Street, N.E., Room 450
Salem, OR 97310-0506

Daniel E. O'Leary
DAVIS WRIGHT TREMAINE
1300 S.W. Fifth Avenue, Suite 2300
Portland, OR 97201

D. Lawrence Wobbrock
1020 S.W. Taylor Street, Suit 800
Portland, OR 97205

Attorneys for Defendants and Intervenor-Defendants

JONES, Judge:

This lawsuit involves a federal constitutional challenge to Ballot Measures 6 and 9 which amended the Oregon Constitution. This case is before the Court on Plaintiffs' (#9) and Defendants' (#25) Cross-Motions for Summary Judgment on the constitutionality of Measure 6,[1] as well as Plaintiffs' Motion to Strike (#60), Motion for

---

[1] Measure 6 reads:

Be it enacted by the People of Oregon:

SECTION 1. For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donations were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by the federal, state, or local government for purposes of campaigning for an elected public office.

SECTION 2. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

SECTION 3. A qualified donor (an individual who is a resident within the electoral district of the office sought by the

Leave to File an Additional Affidavit (#61), and Motion for Leave to File a Second Amended Complaint (#57).[2]

## FACTUAL BACKGROUND

On November 8, 1994, Oregon voters passed Measure 6 which essentially limits the amount of campaign contributions that candidates may accept from out-of-district donors. The Measure is comprised of four sections:

> (1) Section 1 allows candidates to "use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate * * * ;"

---

candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.

SECTION 4. A violation of Section (3) shall be an unclassified felony.

[2] "Plaintiffs" include Fred Vannatta, George Boehnke, Charles Gill, Denny Smith, and the Center to Protect Free Speech (CTPFS). "Defendants" include Phil Keisling and Ted Kulongoski. Lastly, the League of Women Voters of Oregon and the Oregon State Public Interest Research Group intervened as Defendants.

(2) where more than ten percent of a candidate's total campaign funding is in violation of Section 1, Section 2 punishes the candidate by either (a) forcing the *elected official* to forfeit the office and to not hold a subsequent elected public office for a period equal to twice the tenure of the office sought, or (b) forbidding the *unelected candidate* from holding an elected public office for a period equal to twice the tenure of the office sought;

(3) Section 3 prohibits "qualified donors" (*i.e.*, in-district residents) from contributing funds to a candidate on behalf of an out-of-district resident;

(4) Section 4 labels a violation of Section 3 as an "unclassified felony."

Defs.' Ex. A at 1. Entitled the "Freedom From Special Interests" initiative, Measure 6 is intended to prevent out-of-district individuals and organizations from buying influence in elections, thus allowing "ordinary people [to] secure their rightful control of their own government." *Id.* at 2.

Several months after Measure 6 amended the Oregon Constitution, Plaintiffs Vannatta, Gill, and CTPFS attest that they attempted to make $100 contributions to an out-of-district candidate but were informed that their contributions could not be accepted as a result of Measure 6. In addition, Plaintiff Boehnke alleges that he wishes to solicit and spend funds from out-of-district contributors, but is forbidden to do so by Measure 6. Lastly, pursuant to Measure 6, Plaintiff Smith rejected an out-of-district

contribution from Mr. Gill who sent $100 to help Mr. Smith recoup his 1994 campaign debt.

Plaintiffs argue that Measure 6 violates their rights under the United States Constitution. Therefore, pursuant to the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Plaintiffs seek to enjoin Defendants from enforcing Measure 6, and request the Court to declare the Measure void as unconstitutional, respectively. All parties moved for summary judgment, and Plaintiffs also assert three additional motions.

## DISCUSSION

### I. Plaintiffs' Preliminary Motions

Plaintiffs move to strike newspaper articles included in Defendants' exhibits because they are inadmissible hearsay which may not be considered by a court on a motion for summary judgment. The articles discuss the amounts and effects of special interest contributions, and were offered by Defendants to show that out-of-district donors in fact pose a real threat to the campaign system. Because the articles are out-of-court statements offered to prove the truth of the facts asserted therein, and were neither made under oath nor subject to cross-examination, they are inadmissible hearsay. *See, e.g., Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (court refused to consider hearsay newspaper account in exhibit form and asserted that "inadmissible evidence may not be considered"). Accordingly, Plaintiffs' Motion to Strike (#60) Defendants' Exhibits A, B, and C (attached to Defendants' Reply) is GRANTED.

Plaintiff also moves to supplement the record with an additional affidavit from Plaintiff Boehnke, and to file a Second Amended Complaint, both of which include allegations that Plaintiff Boehnke has solicited funds from out-of-district donors for his 1996 campaign. Plaintiffs' Motion for Leave to File an Additional Affidavit (#61) and Plaintiffs' Motion for Leave to File a Second Amended Complaint (#57) are GRANTED.

II. Cross-Motions for Summary Judgment

**A. Standard**

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989), *cert. denied*, 493 U.S. 809 (1989).

The substantive law governing a claim determines whether a fact is material. *Anderson*, 477 U.S. at 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts as to the existence of a material factual issue are resolved

against the moving party. *T.W. Elec. Serv.* at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-31.

Plaintiffs challenge Measure 6 under (1) the First Amendment, (2) the Due Process Clause of the Fifth Amendment, (3) the Equal Protection Clause of the Fourteenth Amendment, (4) the Privileges and Immunities Clause of Article IV, and (5) the Commerce Clause of the United States Constitution. Defendants respond by arguing that this Court lacks jurisdiction over Plaintiffs' lawsuit and that Measure 6 is constitutional. As there are no genuine issues of material fact, Defendants' jurisdictional arguments must be addressed before considering the constitutionality of Measure 6.

**B. Subject Matter Jurisdiction**

Defendants originally advance three related arguments in support of their assertion that this Court lacks jurisdiction over Plaintiffs' lawsuit. First, they claim that there is no justiciable case or controversy because the mere existence of a law is not enough to warrant pre-enforcement judicial review under the Declaratory Judgment Act. Second, Plaintiffs lack standing because they allege no more than a hypothetical threat of injury which cannot satisfy the concrete injury in fact requirement of Article III of the Constitution. Defendants apparently withdrew the second contention before oral argument on July 13, 1995. Lastly, Defendants argue that Plaintiffs' claims are not ripe because they involve uncertain or contingent future events that may not occur. I will address all issues because the parties cannot invoke the

jurisdiction of this court by stipulating to the jurisdictional requirement of standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.")

Plaintiffs explain that they may receive judicial review without exposing themselves to criminal prosecution where there exists a credible threat of prosecution. Moreover, Plaintiffs attempted to either confer or accept campaign contributions; therefore, they have suffered concrete injuries which permit this Court to address the merits of Plaintiffs' claims.

**1. Standing**

Article III of the Constitution limits federal jurisdiction to cases or controversies of which standing is a core component. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). The irreducible constitutional minimum of standing contains three requirements: plaintiffs must establish that (1) they have suffered an actual or imminent, concrete injury in fact, (2) there is a causal connection between the alleged injury and the conduct complained of, and (3) it is likely that a favorable decision will redress plaintiffs' injury. *Id.; Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 506, 510 (9th Cir. 1991).

Defendants acknowledge that if one plaintiff has standing, it does not matter whether the others do. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986). In the present action, Plaintiffs have standing to challenge Measure 6 if

one of the Plaintiffs can show an actual or imminent injury in fact.

"[T]he nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Lujan*, 112 S.Ct. at 2137. Applying this principle, Judge Dwyer held that Congressman Foley had standing to challenge a term limit initiative because (1) he was the object of the law, (2) he would be prevented from running for another term if the law is enforced, and (3) he intended to run for an additional term. *Thorsted v. Gregoire*, 841 F.Supp. 1068, 1073 (W.D.Wash. 1994).

Sections 1 and 2 of Measure 6 prohibit candidates from accepting out-of-district contributions, whereas Sections 3 and 4 criminalize donations made by in-district residents on behalf of out-of-district contributors. Though Plaintiffs challenge all Sections of Measure 6, their affidavits and allegations encompass conduct relating only to Sections 1 and 2.[3] Because none of the Plaintiffs allege a direct injury resulting from Sections 3 and 4 of Measure 6, I find that Plaintiffs do not have

---

[3] As stated earlier, during the pendency of this lawsuit, Plaintiffs Vannatta, Gill, and CTPFS attest that they attempted to make $100 contributions to an out-of-district candidate but were informed by the candidate that their contributions could not be accepted due to Measure 6. Conversely, Plaintiff Boehnke states that he is soliciting funds for his 1996 campaign and intends to use more than ten percent of his campaign funds from out-of-district contributors.

subject matter jurisdiction to consider the constitutionality of Sections 3 and 4 of Measure 6.

With respect to Section 1 and 2, Plaintiff Boehnke provides the following statements in support of his standing to challenge Measure 6:

(1) he was the Republican nominee for State Representative in the last election;

(2) he intends to run again for that office in the May 1996 election;

(3) he has registered his own political committee;

(4) he intends to solicit contributions from his children who live outside of his district;

(5) he wishes to use more than ten percent of the funds that he receives from out-of-district contributors.

As a candidate, Mr. Boehnke is undeniably an "object" of Measure 6, like Congressman Foley in *Thorsted*. Moreover, Mr. Boehnke avers more concrete facts than alleged by Congressman Foley in *Thorsted*, which show that he will be imminently injured by Measure 6 if he cannot "use or direct" more than ten percent of the funds he receives from out-of-district donors. As a candidate in an Oregon election in less than a year, Mr. Boehnke has standing to challenge the contribution limits imposed by Measure 6.

Furthermore, as contributors, Plaintiffs Vannatta, Gill, and CTPFS also have standing to challenge Measure 6. Even assuming that these Plaintiffs are not the "objects" of Measure 6, it is well settled that where candidates are prevented from accepting contributions, contributors are also injured:

> the Supreme Court held in *Buckley v. Valeo* that contributing money is an act of political association that is protected by the First Amendment because the act of contributing serves to associate the contributor with a candidate as well as with like-minded contributors. 424 U.S. 1, 22 (1976) (per curiam).

*Service Emp. Intern v. Fair Political Prac. Com'n*, 955 F.2d 1312, 1316 (9th Cir. 1992) (contributors had standing to challenge law which, as applied, limited amount of contributions non-incumbents could accept), *cert. den.*, 112 S.Ct. 3056 (1992); *see also, Renne v. Geary*, 111 S.Ct. 2331, 2338 (1991) ("Respondents of course have standing to claim that [a law] has been applied in an unconstitutional matter to bar their own speech.")

The contributors in the instant case have been and will continue to be prevented from associating with out-of-district candidates due to Measure 6. Therefore, Plaintiffs Gill, Vannatta, and CTPFS also have standing to challenge Measure 6.[4]

The Court is mindful that a mere subjective chill on protected expression is not adequate to constitute the actual or imminent injury in fact necessary for standing. *Associated Gen. Contractors of Cal. v. Coalition*, 950 F.2d 1401, 1406-07 (9th Cir. 1991) (citing *Laird v. Tatum*, 408 U.S. 1 (1972) (alleged chilling effect of Army data-gathering and surveillance of civilian political activity was

---

[4] Whether Mr. Smith has standing is uncertain because it is not clear whether Measure 6 applies to campaign debts incurred prior to the enactment of the Measure. Nonetheless, this issue need not be resolved because the other parties have standing.

insufficient to confer standing for a First Amendment challenge), *cert. den.*, 503 U.S. 985 (1992); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (no standing to challenge Hatch Act's bar on political activity by government employees where plaintiffs had neither violated the act by participating in political activity nor asserted firm plans to do so in the future)). The Court is also aware that to have standing to seek injunctive relief the plaintiff must allege an imminent threat of future harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (1983) (no standing to seek an injunction against police where there was no likelihood that plaintiff would be subject to future police brutality).

Plaintiffs Gill, Vannatta, and CTPFS suffer more than a subjective chill on their political expression. They have, in fact, been prevented from associating with out-of-district candidates who returned Plaintiffs' contributions due to Measure 6. This is not only a past injury but rather extends forward as a future chill on their right to associate with certain candidates. Consequently, Plaintiffs Gill, Vannatta, and CTPFS have standing to seek injunctive relief in their challenge to Measure 6.

**2. Ripeness**

"Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary*, 501 U.S. 312, 320 (1991). "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S.

289, 298 (1979). "When a plaintiff seeks to engage in conduct proscribed by statute and a credible threat of prosecution exists, he need not 'expose himself to actual arrest and prosecution to be entitled to challenge [the] statute * * * .' " *San Francisco County Democratic Cent. Com. v. Eu*, 826 F.2d 814, 821 (9th Cir. 1987) (quoting *Babbitt* at 298), *aff'd*, 489 U.S. 214 (1989). "This is especially true in a First Amendment case because of the sensitive nature of constitutionally protected expression." *Eu* at 821 (internal quotation omitted). Nonetheless, "when plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt* at 298-99 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

Plaintiffs' affidavits stating that they were, in fact, either unable to make or receive out-of-district contributions show that Sections 1 and 2 of Measure 6 are currently chilling protected expression which meets the requirement that the " 'contentions of the parties * * * present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.' " *Barker v. State of Wis. Ethics Bd.*, 815 F.Supp. 1216, 1219 (W.D.Wis. 1993) (chilling effect of law which prohibited lobbyists from volunteering personal services was sufficient to allow pre-enforcement review of the statute) (quoting *Babbitt*, 442 U.S. at 298) (internal quotation omitted); *see also Eu*, 826 F.2d at 822 (challenge to a ban on pre-primary partisan endorsements held justiciable where "plaintiffs' uncontroverted affidavits show that they have consistently, if reluctantly, obeyed the statutes in conducting

party affairs.") Accordingly, I find that Plaintiffs have presented a justiciable controversy with regard to the effects of Sections 1 and 2 of Measure 6 on Plaintiffs' First Amendment rights of free expression.

In so holding, I reject Defendants' contention that *Renne v. Geary*, 501 U.S. 312, 320 (1991), compels a different conclusion on justiciability. In *Renne*, voters and party central committees challenged the constitutionality of an amendment to the California Constitution which prohibited political parties from endorsing or supporting candidates for judicial, school, county, and city offices. *Id.* at 314. However, the Supreme Court determined that the case was not justiciable because (1) plaintiffs did not suffer any adverse impacts during the pendency of the lawsuit, (2) plaintiffs did not allege an imminent injury, and (3) the criminal provision of the amendment did not clearly proscribe the conduct in which plaintiffs seek to engage. *Id.* at 320-22. Accordingly, the Court postponed judicial review "until a more concrete controversy arises, [which] also has the advantage of permitting the state courts further opportunity to construe [the amendment], and perhaps in the process to 'materially alter the question to be decided.' " *Id.* at 323 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 306 (1979)).

Unlike the amendment in *Renne*, Measure 6 adversely impacted Plaintiffs during the pendency of the lawsuit and unambiguously proscribes the conduct in which Plaintiffs seek to engage. Moreover, Plaintiffs allege sufficient facts regarding the chilling effect of Measure 6 to show the existence of a present and future injury suffered by Plaintiffs. For these reasons, I find that *Renne* is inapplicable to the present action, and that Plaintiffs have

presented a justiciable controversy with regard to their claim which incorporates the First and Fourteenth Amendments.[5]

### C. Abstention

The only applicable doctrine of abstention in this case was evinced by *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). "To abstain Under *Pullman*, a federal court must find all three of the following factors: first, the complaint touches a sensitive area of social policy upon which the federal court ought not to enter unless no alternative to its adjudication is open; second, a definitive ruling on the state issue would terminate the controversy; and third, the possibly determinative issue of state law is doubtful." *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989). However, "[i]n first amendment cases, the first of these factors will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Id.* Moreover, abstention would force a plaintiff who has commenced a federal action to suffer the delay for a state court determination would aggravate the chilling effect of the law. *Id.*

Abstention is not appropriate in the present action because (1) Measure 6 implicates important concerns regarding First Amendment rights, (2) abstention would merely exacerbate Plaintiffs' injuries, and (3) a state court

---

[5] I express no opinion as to whether Plaintiffs present a justiciable case or controversy under the other cited constitutional provisions.

ruling would not likely terminate the controversy. For these reasons, I reach the merits of Plaintiffs' challenge.

### D. First and Fourteenth Amendment

Plaintiffs have pled a facial challenge to Measure 6, and both parties agreed at oral argument that the Court should conduct a facial analysis of the constitutionality of the Measure. Measure 6 primarily impacts campaign donations by out-of-district contributors. "Certainly, the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression at the core of our electoral process and of the First Amendment freedoms.' " *Austin v. United States*, 494 U.S. 652, 656 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1968) (internal quotation omitted)). Therefore, campaign contributions are political speech protected by the First Amendment.

Measure 6 substantially limits contributors from donating money to out-of-district candidates. Laws which directly burden First Amendment rights are subject to strict scrutiny: the state must show that Measure 6 is "narrowly tailored to serve a compelling state interest." *Austin* at 657, 666.[6]

In *Buckley v. Valeo*, plaintiffs challenged contribution and expenditure limits in the Federal Election Campaign

---

[6] In *Austin*, the Court stated the following with regard to direct burdens on the First Amendment: "we must ascertain whether [the law] burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest." *Id.* at 657.

Act (FECA) of 1974.[7] 424 U.S. 1, 8. After applying strict scrutiny to both limitations,[8] the Court sustained the contribution limits because they were supported by a compelling state interest in preventing "improper influence," but the Court invalidated the expenditure restrictions because they failed to serve any substantial governmental interest. 424 U.S. at 54-58. Similarly, in *Austin*, the Supreme Court upheld restrictions on independent expenditures[9] by corporations under the First Amendment because they were narrowly tailored to serve the state's compelling interest in averting corruption and improper influence.[10] 494 U.S. at 658-661.

---

[7] The contribution limitations included a maximum of $1000 on contributions by individuals and groups to candidates and authorized campaign committees, a $5000 limitation on campaign contributions by political committees, and a $25,000 limitation on total contributions by an individual during a calendar year. Conversely, the expenditure limitations varied considerably.

[8] Though Defendants strenuously argue that *Buckley* applied less than strict scrutiny to contribution limitations, subsequent cases and *Buckley* itself disagrees. In examining the constitutionality of contribution limitations, *Buckley* recognized that contributions are a form of political association, thus burdens on that right are " 'subject to the closest scrutiny.' " *Buckley* at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)).

[9] "Independent expenditures" differ from "campaign contributions" only in that they are not made at the direction or under the control of another person for that person's political campaign.

[10] Notably, however, the law did not limit the amount of independent expenditures by the corporations but merely required corporations to make such expenditures from segregated funds used solely for political purposes. This

In the present action, Measure 6 burdens a contributor's political speech and right to associate by limiting the amount of the donated funds that may be used by the candidate. Campaign contributions may, in some cases, be restricted because of the greater potential for political "quid pro quo" corruption. *See Buckley*, 424 U.S. at 26-29. Nonetheless, Defendants must still demonstrate in this case that the contribution limitation is narrowly tailored to serve a compelling state interest. At least both parties agree that the state has a compelling interest in preventing "corruption or the appearance of corruption." *Federal Election Commission v. National Conservation Political Action Committed* [sic], 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.") The issue then is whether the Measure 6 contribution limitation is narrowly tailored to prevent corruption.

I find that Measure 6 campaign limitations are not narrowly tailored to preventing political corruption for several reasons. First, the Measure prohibits non-corrupt, out-of-district contributors from politically associating with candidates running for state offices. Elected officials in state offices impact all state residents not just the candidate's constituents within his election district. Therefore, the Measure impairs out-of-district residents from associating with a candidate for state office who, if elected, will have a real and direct impact on those persons.

---

nonetheless burdened the right of free association and was strictly scrutinized.

Secondly, the Measure fails to thwart any in-district corruption. The candidate could be wholly funded by one or more wealthy "in-district" individuals who seek to further their own "special interests" by contributing huge amounts of money.

Lastly, the Measure fails to prevent large out-of-district contributions, so long as they do not exceed 10% of the candidate's total campaign expenditures. Therefore, the more money the candidate receives from in-district contributions, the larger the contributions the candidate may accept from out-of-district donors. If the purpose of the Measure is to discourage outside special interests, then the Measure should not be designed to allow out-of-district contributors to increase their donations based upon in-district funding.

In sum, I find that Measure 6 is not narrowly tailored to serve the state's interest in preventing corruption. Because Measure 6 contravenes the First Amendment, I find it unnecessary to address Plaintiffs' challenges under the Fifth Amendment, the Fourteenth Amendment, the Privileges and Immunities Clause, and the Commerce Clause.

Furthermore, I conclude that the unconstitutional portions of Measure are not severable because the Measure's lack of clarity prevents the Court from ascertaining the intentions of the people who enacted it.

My decision not to sever is buttressed by the fact that the state legislature is free to enact legislation which limits campaign contributions by corporations for profit, labor unions, banks, etc. A ban on contributions to federal candidate elections by corporations, labor unions,

banks and similar entities has been in existence for almost 90 years and has been found to comport with the First Amendment. *See FEC v. National Right to Work Committee*, 459 U.S. 197 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

Measure 6 makes no express effort to exempt individuals, non-profit corporations, partnerships and the like. A measure must do so to pass federal constitutional muster.

Lastly, I exercise my discretion under the *Pullman* doctrine to abstain from hearing constitutional challenges to Measure 9 which is an Oregon statute, until after the Oregon state courts have passed upon its constitutional muster. Only if Oregon courts find that Measure 9 is constitutional, will I address the federal constitutionality of Measure 9. Though I am dismissing this case for administrative purposes, if Oregon courts conclude that Measure 9 is constitutional under the Oregon Constitution, Plaintiffs may reopen this case without costs.

## CONCLUSION

IT IS ORDERED that Plaintiffs' Motion for Leave to File an Additional Affidavit (#61), Plaintiffs' Motion for Leave to File a Second Amended Complaint (#57), and Plaintiffs' Motion to Strike (#60) are GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (#9) is GRANTED. Accordingly, Defendants' Motion for Summary Judgment (#25) is DENIED.

IT IS FURTHER ORDERED that this case be DISMISSED.

DATED this 13th day of July, 1995.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | |
|---|---|
| FRED VANNATTA, GEORGE BOEHNKE, CHARLES B. GILL, JR., and CENTER TO PROTECT FREE SPEECH, INC., Plaintiffs, v. PHIL KEISLING, in his capacity as Secretary of the State of Oregon, and TED KULONGOSKI, in his capacity as Attorney General of the State of Oregon, Defendants. and LEAGUE OF WOMEN VOTERS, et al., Defendant-Intervenors. | Civil No. 94-1541-JO<br>DECLARATORY JUDGMENT AND MANDATORY INJUNCTION |

THIS MATTER having come on for hearing on the parties' motions for summary judgment on July 13, 1995, the court having granted plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment, and having issued an opinion and order of the same date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. For the reasons provided in this court's opinion and order of July 13, 1995, the contribution limits in Sections 1 and 2 of Ballot Measure 6, adopted on November 8, 1994, and codified as a portion of the Oregon Constitution as Article II, § 22, contravene the First Amendment to the United States Constitution and are therefore void.

2. Sections 3 and 4 of Measure 6 are meaningless without Sections 1 and 2 and cannot be separated and are therefore void.

3. Defendants Phil Keisling, in his capacity as Secretary of the State of Oregon, and Ted Kulongoski, in his capacity as Attorney General of the State of Oregon, are permanently enjoined from enforcing or attempting to enforce the contribution limits in Sections 1, 2, 3 and 4 of Measure 6 (Article II, § 22 of the Oregon Constitution).

4. The court abstains with respect to plaintiffs' claims concerning Measure 9, Chapter 1 of Laws 1995. These claims are dismissed without prejudice.

DATED this 31 day of July, 1995.

/s/ Robert E. Jones
ROBERT E. JONES
United States
District Judge

## APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| FRED VANNATTA; GEORGE BOEHNKE; CENTER TO PROTECT FREE SPEECH, INC., Plaintiffs-Appellees, v. PHIL KEISLING, in his capacity as Secretary of the State of Oregon; TED KULONGOSKI, in his capacity as Attorney General of the State of Oregon, Defendants. and GORDON MILLER, Defendant-Intervenor/ Appellant. | Nos. 95-35998, 95-35999 D.C. No. CV-94-01541-JO ORDER |
| NATIONAL VOTING RIGHTS INSTITUTE, Amicus. | |

Before: FERGUSON and BRUNETTI, Circuit Judges, and KING,* District Judge.

Judge Brunetti has voted to grant the petition for rehearing and accept the en banc suggestion. Judges Ferguson and King have voted to deny the petition for rehearing and recommend the denial of the en banc request.

The full court has been advised of the suggestion for an en banc hearing and no judge requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

**APPENDIX E**

VANCE DAY
1328 Liberty Street, S.E.
Salem, Oregon 97302
(503) 399-2667
Oregon State Bar No. 91248

Attorney for Gordon Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | |
|---|---|
| FRED VANNATTA, GEORGE BOEHNKE, CHARLES B. GILL, JR., and CENTER TO PROTECT FREE SPEECH, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>PHIL KEISLING, in his capacity as Secretary of the State of Oregon, and TED KULONGOSKI, in his capacity as Attorney General of the State of Oregon,<br><br>Defendants. | Civil No. 94-1541-JO<br><br>AFFIDAVIT OF GORDON MILLER IN SUPPORT OF MOTION TO INTERVENE |

I, GORDON MILLER, having been first duly sworn, hereby depose and say:

1. I am competent to present evidence in the above-captioned action and have personal knowledge of the matters set forth here.

2. I am a native of, and registered voter of, the State of Oregon who, since 1979, has resided in the City of Salem. I have voted in the previous four Oregon elections and intend to vote in the November 1996 Oregon state and federal election.

3. In 1994 I was a candidate in the Republican Party's primary election for the party's nomination as its candidate for election to the Oregon House of Representatives from the thirty-first election district here in Salem. I won the primary election. But I lost the general election; although in losing I received forty-nine percent of the votes cast. Throughout my 1994 election campaign I refused to accept campaign contributions other than those contributed to my campaign by individuals who were residents of the thirty-first district. I intend to again seek elective public office. And when I do, I intend to again refuse to except [sic] campaign contributions except from individuals who are residents of the election district in which I am seeking election.

4. I have been interested in politics and political science since grade school. And over the years I have had many conversations with a friend of our family who served in Congress for many years. During a conversation we had in 1991, the former congressman told me that, after having served a number of terms in the United States House of Representatives, he had decided that one of the major problems with the contemporary political process was the influence that political action committees

wield through their campaign contributions, both by deciding (with their checkbooks) which candidates will be elected and which will not, and over the subsequent legislative acts of successful candidates.

5. As a consequence of the conversation described in paragraph no. 4, I began studying how the present campaign finance rules influence both the outcome of Oregon federal and state elections and the subsequent legislative acts of successful candidates. As a result of that inquiry, I concluded that the present Oregon campaign finance system violates elemental principles of the "republican form of government" that the Founding Fathers guaranteed to the people of Oregon by including article IV, section 4, in the United States Constitution (i.e., by allowing individuals who are not residents of an election district to influence, through the making of campaign contributions, the outcome of elections in which, in a constitutional sense, they have no interest).

6. The Oregon legislature is not likely to change the campaign finance rules that its members have used successfully to win election to office. So in 1992 I decided that the people of Oregon should be afforded an opportunity to make the needed change themselves through the initiative process. To that end, that year I wrote the text of the amendment to the Oregon Constitution that now is known as Measure No. 6. After doing so I submitted my amendment to the Secretary of State and organized a group named "No Special Interests" to obtain the signatures I needed to put Measure No. 6 on the November 1992 election ballot. However, I was not successful in obtaining the requisite number of signatures prior to the deadline for the November 1992 election.

7. Early in 1993 I resubmitted the text of Measure No. 6 to the Secretary of State, who certified a new initiative petition. I also organized a new group named "Freedom from Special Interests" to obtain the requisite number of signatures. This time I was successful. And in January 1994 I submitted approximately 110,000 signatures to the Secretary of State. As a consequence, Measure No. 6 appeared on the November 1994 election ballot. Since "Freedom from Special Interests" had no money to pay for radio or television or newspaper advertisements, we ran a word-of-mouth campaign. But the campaign was successful, and in November 1994 the people of Oregon passed Measure No. 6 by a vote of 628,180 to 555,019 (53 percent to 47 percent).

8. As the sponsor of Measure No. 6 I was concerned when this lawsuit was filed. However, I felt that the Attorney General would do a good job in defending the constitutionality of Measure No. 6. And since I know little about legal procedure, when the lawsuit was filed I did not know that I could request the court for permission to intervene in order to participate as a party.

9. I have asked the court for permission to intervene as a party now because as a consequence of my conversations with attorneys in the Oregon Department of Justice I am concerned that the Attorney General will not appeal the final judgment in this case to the United States Court of Appeals for the Ninth Circuit. With all due respect to the district court, I believe that its July 13, 1995 decision granting the plaintiffs' motion for summary judgment is incorrectly decided. In addition, since the subject matter of this lawsuit – i.e., the Oregon campaign finance system – is a matter of considerable public importance, and since

628,180 Oregonians have voted to prohibit nonelection district campaign contributions, and since the question of law the district court decided is one of first impression, I strongly believe that the court's final judgment should be appealed. And if I am permitted to intervene in this action, I intend to file and prosecute an appeal of the final judgment. If I am permitted to intervene and the Attorney General subsequently files his own appeal, I believe that, as the sponsor of Measure No. 6, I can contribute a perspective on Measure No. 6 that the Court of Appeals will find useful in deciding the appeal that the Attorney General may not be able to provide. As a party, I also would be able to make my own decision (independent of the Attorney General) whether to file a petition for certiorari with the United States Supreme Court, should that decision need to be made.

/s/ Gordon Miller
Gordon Miller

SUBSCRIBED AND SWORN to before me this 11th day of August, 1995, at Salem, Oregon.

/s/
Notary Public
My Commission Expires: